IN THE

Supreme Court of the United States

A. Y. CHRISMAN AND
H. T. CHRISMAN,
Plaintiffs in Error,

vs.

E. O. MILLER AND
THE HOME OIL COMPANY,
Defendants in Error.

SPECIFICATIONS OF ERROR.

The Specifications of Error upon which plaintiffs in error rely are found at page 131 of the Transcript, and are as follows:

1. The decision of the Court that the location by Barieau and others, upon the 14th day of June, 1895, was not a valid location so as to divest the land of its status as part of the public domain.

2. The decision of the Court that Barieau in June, 1895, made no discovery of oil.

3. The decision of the Court that Miller, his associates and lessees made a valid discovery of oil.

4. The decision of the Court that Miller, his associates and lessees are the only ones of all the alleged locators who have made a discovery of oil.

5. The decision of the Court that no work had been done to protect the Barieau location, and that Barieau and his associates were not in the actual *bona fide* possession of their claim and did not develop it under the requirements of the Statute.

6. The decision of the Court that the Barieau location was itself invalid and therefore there was no occasion for an abandonment of it, because there was nothing to abandon.

7. The decision of the Court that the evidence warrants the finding of the lower Court that the persons named as co-locators in the Miller location were *bona fide* locators and that the location was made for them all.

8. The decision of the Court that between the date of the Miller location and the date of the Miller discovery no rights had intervened and that the possessory title of the holders under the Miller location was justly quieted against the adverse claimants.

9. The decision of the Court that in marking boundaries, doing assessment work, the 160 acres is treated as an entirety under one location and for the purpose of discovery should be treated in the same manner.

10. The decision of the Court that The Home Oil

Company in the month of October, 1897, made the first discovery upon the land in question.

11. The decision of the Court that the ground attempted to be located by Miller and associates on December 31st, 1896, by the erection of monuments and posting of a notice upon the 31st day of December, 1896, was then, prior thereto or thereafter during the year 1896, open for location, or was public, vacant or unappropriated mineral land of the United States.

12. The decision of the Court that upon January 1st, 1897, the tracts upon which the defendants Chrisman located were not vacant, public and unappropriated mineral lands of the United States and open to location by them or any citizens of the United States or those who had declared their intention to become such.

13. The decision of the Court that any rights were vested prior to the discovery of mineral within the boundaries of the tract of land sought to be located.

14. The decision of the Court that any person could by location acquire any rights upon the public domain under the mining laws of the United States, which would give him the right by virtue of one marking or one placer location more than twenty acres in area.

15. The decision of the Court that Miller could become vested with the rights of his seven associates

in a 160 acre tract attempted to be located under the Statutes of the United States as placer mineral ground, it being admitted that there was no discovery of mineral within the boundaries of said 160 acres at any time, and that the seven associates attempted to transfer and convey their alleged interests to the remaining one, and it being admitted and found that there was no discovery until after said seven associates had made said conveyance.

16. The decision of the Court that the attempted location of said mineral land by Miller and his associates was made in good faith on or about the 31st day of December, 1896, or thereafter in good faith perfected.

17. The decision of the Court that the said attempted location made by Miller and his associates on the 31st day of December, 1896, was not a fraud upon the United States or evading the laws of the United States requiring one hundred dollars' worth of work to be performed annually upon each and every mining location.

18. The decision of the Court in permitting the said Miller and his associates to make or attempt a location on the 31st day of December, 1896, it appearing that the attempted abandonment by the said Miller of the Barieau location of June, 1895, was not concurred in by said Barieau and that said attempted abandonment by Miller was made for the purpose of

re-locating the same ground in order to evade the Statutes of the United States requiring one hundred dollars' worth of work to be done annually on each and every mining location.

19. The Court erred in holding that crude petroleum seeping from the ground was not a discovery, and that a seepage was a mere indication of oil.

20. The Court erred in holding that the seepage within the twenty acre tracts located by Chrismans and oil exposed in a spring thereon was not a discovery of mineral within the Statute.

21. The Court erred in holding that one person could locate a placer claim by one location to twenty acres of ground.

22. The Court erred in holding that any person in one location of placer mining ground could be vested with any rights from seven associates who had attempted to convey alleged rights to him, and thereby give one person the right to own or control by one location as much as one hundred and sixty acres of mineral land.

The error so specified is argued at length in the annexed brief.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

This is an action brought by defendants in error in the Superior Court of Fresno County, State of California, to quiet title to certain lands in said County of Fresno.

The complaint was filed on the 14th day of October, 1898.

The plaintiffs in error appeared and filed a joint answer in said action, A. Y. Chrisman claiming a certain part of said land and H. T. Chrisman claiming a certain other part thereof.

All of the parties claimed the land under and by virtue of locations alleged by them to have been made thereon under the laws of the United States regulating the sale and disposition of the mineral lands of the United States. A jury trial was waived, and after a hearing upon the merits a judgment was entered in said Superior Court in favor of defendants in error.

Appeals were taken by plaintiffs in error on the 16th day of December, 1899, from the judgment and also from the order of the Court denying their motions for a new trial, and on the 30th day of September, 1903, the Supreme Court of the State of California affirmed the judgment of the Superior Court.

Plaintiffs in error filed a petition for rehearing in banc which was denied, Chief Justice Beatty dissenting in a written opinion filed October 31, 1903.

The majority opinion of the Supreme Court of the State of California will be found on page 121 of the Record and Chief Justice Beatty's dissenting opinion appears on page 127 thereof.

Plaintiffs in error sued out a writ of error and the same was allowed November 7, 1903.

A.

STATEMENT OF THE CASE.

During the year 1895, and for a long time prior thereto, the land in controversy was a part of the

public domain of the United States open to exploration and location under the mining laws thereof. In the year 1895 certain persons, namely, Frank Barrett, K. W. Brown, James L. McLean, James E. Campbell, James A. McClurg, Sr., Hart H. Barrett, A. Barieau and J. J. Bright, as an association of persons, made a placer location upon the land specifically described as follows: The northeast quarter of section 20, township 19 south, range 15 east, M. D. B. and M., situate in Fresno County, State of California. This location was called the King Petroleum Placer Mining Claim and was made on the 14th day of June, 1895. For convenience this location will be referred to throughout this brief as the Barieau location.

Record, page 65.

Nothing further was done upon the ground by any one until the month of January, 1896, when the said A. Barieau went upon the land with a surveyor and distinctly marked the boundaries of said location upon the ground.

Record, page 65.

On or about the 24th day of December, 1896, seven out of the eight of the original locators of the King Petroleum Mining Claim made and delivered to the Producers and Consumers' Oil Company, a corpora-

tion, deeds of conveyance of their seven-eighths interest in said land. A. Barieau did not join in the conveyance, but as late as December 30th, 1896, was on the said land for the purpose of locating the quarter section.

Record, page 68.

On or about the 24th day of December, 1896, the Producers and Consumers' Oil Company conveyed the interests of Barieau's seven associates, which it had acquired as heretofore stated, to E. O. Miller, one of the defendants in error herein.

Record, page 43.

The said E. O. Miller afterwards, on or about the 29th day of December, 1896, made and executed an instrument in writing purporting to be an abandonment and relinquishment of his right, title and interest in the land in controversy to the United States.

Record, page 44.

This notice of abandonment was recorded in the records of Fresno County December 31, 1896.

Record, page 44.

On the same day, viz., December 31, 1896, said E. O. Miller attempted to make a location upon the land in controversy under the mineral laws of the

United States by posting a notice of location upon the ground. The names of the locators specified in the said notice of location were E. O. Miller, W. F. Hall, D. G. Overall, Harry Levinson, Charles H. Smith, J. A. Hannah, L. E. Hall and R. B. Biddle.

Record, pages 40, 41.

On the first day of January, 1897, A. Y. Chrisman, plaintiff in error herein, entered upon the land and made a placer location upon that portion thereof described as follows, to-wit, the south half of the southwest quarter of the northeast quarter of said section 20 above-mentioned, under and in pursuance of the laws of the United States and of the State of California, regulating the sale and disposition of mineral land of the United States in the State of California.

Record, page 80.

And on said first day of January, H. T. Chrisman, plaintiff in error herein, also entered upon the land in question, and in the same manner as aforesaid, made a location upon the south half of the southeast quarter of the northeast quarter of said section 20.

Record, pages 70, 71, 72.

Upon the 31st day of July, 1897, and before any discovery of oil had been made under Miller's alleged location, Miller's associates executed to him a

deed of all their right, title and interest in the property.

Record, pages 46, 47.

Subsequently and upon the 17th day of September, 1897, Miller executed a lease of the premises, which lease was transferred to the Home Oil Company, defendant in error herein.

Record, page 42.

The Home Oil Company thereupon took possession of the premises, bored for, and struck oil.

B.

CONTENTIONS OF PLAINTIFFS IN ERROR.

Plaintiffs in error contend:

I.

That the location by Barieau and others upon the 14th of June, 1895, was a valid location, which divested the land of its status as part of the public domain and appropriated it to private claim and domain until the end of the year 1896.

II.

That the alleged abandonment by E. O. Miller on December 31st, 1896, was invalid, inoperative

and of no effect because it was made with an intent and for the purpose of re-locating the property by himself and others working with him and was not a true abandonment.

III.

That the location made by E. O. Miller and others, on December 31st, 1896, was invalid, (a) because it was made at a time when there was a valid subsisting location on the land and at a time when the land was not open to exploration and location, and in consequence no rights whatever were initiated by that location; (b), because it was not based on a discovery and was not perfected by a subsequent discovery made before the rights of others attached to the property; (c), because the location in fact was made by Miller, Hall and Hannah, who were the only bona fide locators out of the eight persons named in their location, the other five being mere dummies.

IV.

That by reason of the fact that no assessment work whatever was done on the land in question in the year 1896, the location made by Barieau and others lapsed, and the land on the 1st day of January, 1897, became again open for exploration and location, and was open for exploration and location at the time plaintiffs in error made their locations thereon upon said 1st day of January, 1897.

V.

That the locations made by the plaintiffs in error were valid locations and were followed up by the doing of all those things required by law in order to make a valid mining location in the State of California.

VI.

That the conveyance to Miller upon the 31st day of July, 1897, by his seven associates, being given prior to a discovery of oil vested no title in him or his lessees and rendered the location invalid at least as to seven-eighths of the land in controversy. In other words, there can be no assignment of the right to locate.

C.

BRIEF OF THE ARGUMENT.

I.

The location made by A. Barieau and others on June 14, 1895, was a valid location, which operated to segregate the land from the public domain of the United States, and by itself, without any other act being done, prevented a location being made on the land in question prior to the first day of January, 1897.

All the parties hereto derive their claim of right to the land in question, under and by virtue of the

laws of the United States relating to placer claims, and hence the fundamental law applicable to the case will be found in sections 2320, 2324 and 2329, United States Revised Statutes, and an Act of Congress approved February 11th, 1897 (29th U. S. Statutes at large, 526) and the statutes of the State of California.

The sections, which are pertinent to the case at bar, are:

Section 2320:

> "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim."

Section 2324:

> "The location must be distinctly marked on the ground so that its boundaries can be readily traced."

Section 2329:

> "Claims usually called 'placers' * * * shall be subject to entry and patent under like circumstances and conditions and upon similar proceedings, as are provided for vein or lode claims."

Section 2330:

> "But no location of a placer claim made after the ninth day of July, eighteen hundred and sev-

enty-two, shall exceed one hundred and sixty acres for any one person or association of persons."

Section 2331:

"And no such location" (referring to a placer location) "shall include more than twenty acres for each individual claimant."

Under Act Cong., Feb. 11, 1897, C. 216, 29 Stat., 526 (U. S. Comp. St., 1901, p. 1434) the location of oil claims is governed by the mineral laws of the United States applicable to the location of placer mining claims.

By Section 2324, U. S. Comp., Statutes 1901, it is provided that on each claim located after the tenth day of May, 1872, not less than one hundred dollars of labor shall be performed or improvements made during each year. The period within which the work is required to be done is declared *"shall com-" "mence on the first day of January succeeding the " "date of location of such claim, and this section shall " "apply to all claims located since the tenth day of " "May, Anno Domini eighteen hundred and seventy-" "two."*

According to the record in this case, the first that is heard or known of the land in question was in 1889, when the witness Lavelle became acquainted with it. It was then unoccupied.

Record, page 84.

Barieau went on a prospecting trip in April, 1895, and found it unoccupied and unappropriated.

Record, page 65.

He made a discovery of petroleum oil on the land June 15, 1895.

Record, page 65.

Upon cross-examination, Barieau testified as follows respecting his discovery:

> "I saw some indications of oil on this northeast quarter in 1895, in June, and frequently since; all through the month of May up to June, I did nothing else but prospect around; I was there off and on quite often, crossed in every way. . . . The place where I saw the indications of oil is about 10 chains north from the southeast corner, and about 5 or 10 feet inside the section line; it comes out with the water, floats on the water. There is a permanent spring there, especially in the summer when it is hot. The oil runs there in the summer. I know the location because I surveyed it—run the line. There is a spring there and the oil comes out and floats on the water in the summer time when it is hot. In June, 1895, there was a little water with oil and a little oil with the water coming out. It was dripping over a rock about two feet high. There was no pool, it was dripping, just dripping a little water and oil, not much water. It was a narrow gulch. It didn't run down any distance from the point

where it dripped in, only maybe two or three feet."

Record, page 68.

On June 14th, 1895, Barieau posted a notice of location on the land for himself and seven others as an association.

Record, page 65.

In the early part of the month of January, 1896, Barieau again went upon the land, and more distinctly marked the boundaries of said claim. The boundaries were marked by placing stone monuments inscribed with the initials "J. H. F." as a monogram every ten chains on the exterior boundary lines of the claim, and at the corners he placed stakes in monuments of stone.

Record, pages 65, 66.

No intervening rights accrued between the date of the posting of the notice of location, June 14th, 1895, and the time of the marking of the boundaries as aforesaid in the early part of January, 1896.

In the meantime, a copy of the notice of location by Barieau and his co-locators had been recorded.

Record, page 65.

Thus it appears from the undisputed testimony of unimpeached witnesses that the locators of the

"King Petroleum Mining Claim" performed all the essential acts necessary to initiate a valid location, viz., (1) making discovery, (2) marking the claim on the ground, (3) posting the notice of location, and (4) recording the same.

(1) The discovery: In the consideration of the case at bar, it is necessary to bear in mind that the question here arises between parties claiming the land as mineral, and not between parties claiming the land under the laws relating to mineral lands on the one side and parties claiming the land under the laws relating to agricultural lands on the other. And, therefore, the *value or amount* of the mineral discovered cannot be made a question in this case.

The *value* of a mineral deposit is a matter into which the government does not inquire as between two mineral claimants. "Inquiries of this character "are confined to controversies between mineral and "agricultural claimants."

> *Lindley on Mines*, Vol. 1 (2nd ed.), p. 609.
> *Tam* vs. *Story*, 21 L. D., 440.

In a case of contest between mineral claimants on one side and parties holding town-site patents on the other, this Court has repeatedly declared, under the Act of Congress which governs such cases, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands

do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect, but they must at that time contain mineral of such extent and value as to justify expenditures for the purpose of extracting them.

Deffeback vs. *Hawke,* 115 U. S., 392.
Davis vs. *Weibbold,* 139 U. S., 507.
Dower vs. *Richards,* 151 U. S., 658.
Migeon vs. *Montana Ry. Co.,* 77 Fed., 249.

Between two placer claimants the rule is different.

> "To hold that, in order to constitute a discovery as the basis of the location, it must be demonstrated that the discovered deposit will, when worked, yield a profit, or that the lands containing it are, in the condition in which they are discovered, more valuable for mining than for any other purpose, would be to defeat the object and policy of the law." Lindley on Mines, Vol. 1 (2nd ed.), p. 606.

Hence the precise question that is presented to this Court is What constitutes a discovery of petroleum oil under the statute in a controversy between two placer claimants?

The meaning of the word "discovery" does not differ essentially, as it is used in mining, from its meaning as employed in general literature. It is thus defined by the Century Dictionary: "The act "of disclosing to view; the act of finding out or

"bringing to knowledge what was unknown; the first "knowledge of anything."

Century Dictionary, tit. "Discovery," 1-4.

In his second edition of Mineral Lands, Mr. Copp has appended a glossary in which he thus defines "discovery": "The finding of mineral deposit in place upon a mining claim."

Copp's Mineral Lands (2nd ed.), p. 559.

There have been many acts of discovery and surface developments, which have been held to be sufficient under the statute, but it is believed that the case at bar is the first to come before this Court requiring a judicial determination as to what constitutes a discovery of oil under Revised Statutes 2320, 2324 and 2327.

In the case of *Book* vs. *Mining Co.*, 58 Fed., 106, there is found a discussion of what constitutes a "discovery" within the meaning of the United States statutes. And it has frequently been said by Courts that more than ordinary respect is due to the opinion in that case, because it is rendered by Judge Hawley, who enjoys, in a peculiarly high degree, the respect of the Courts and bar alike for his great learning upon the law of mining rights. At page 120, Judge Hawley said:

"What constitutes a discovery of a vein or lode within the meaning of the statute? Section 2320, Rev. St., provides that 'mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the tenth day of May, 1872, whether located by one or more persons, may equal, but shall not exceed, 1500 feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.' The words 'vein or lode,' in the last clause of this statute, were evidently intended to apply to such veins or lodes as were described in the first section, and to have the same meaning, viz., a vein or lode 'of quartz or other rock in place bearing gold, silver,' etc. This statute was intended to be liberal and broad enough to apply to any kind of a lode or vein of quartz or other rock bearing mineral, in whatever kind, character, or formation the mineral might be found. It should be so construed as to protect locators of mining claims, who have discovered rock in place bearing any of the precious metals named therein, sufficient to justify the locators in expending their time and money in prospecting and developing the ground located. It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts, the veins, lodes, and ore deposits are so well and clearly defined as to avoid any questions being raised. In other localities, the mineral is found in seams, narrow crevices, cracks, or fissures in the earth, the precise extent and character

of which cannot fully be ascertained until expensive explorations are made, and the continuity of the ore and existence of the rock in place bearing mineral is established. It never was intended that the locator of a mining claim must determine all these facts before he would be entitled, under the law, to make a valid location. Every vein or lode is liable to have barren spots and narrow places, as well as rich chimneys and pay chutes, or large deposits of valuable ore. When the locator finds rock in place containing mineral, he has made a 'discovery,' within the meaning of the statute, whether the earth or rock is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim."

Commenting upon and approving Judge Hawley's decision in *Book* vs. *Mining Co.*, Mr. Justice Hunt, speaking for the Supreme Court of Montana, in *McShane* vs. *Kenkle,* 44 Pac., 979, at page 981, said:

"It will be observed that throughout the language of Judge Hawley, he does not establish any standard of judgment by which to warrant a justification except the existence, and expected existence, of geological or mineralogical facts from which certain reasonable conclusions are authorized to be drawn. The probable conduct of the practical miner or his beliefs are not regarded as rules or tests of the justification for the guidance of locators. Indeed, throughout his whole succinct and carefully considered statement of the law, as

quoted, the learned judge does not use the word 'miner' at all, but lays stress upon the liberality of the statute, which protects the locator in his discovery and location if rock in place is found containing precious metals, sufficient to justify such locator in prospecting and developing the ground located. Nor must the discoverer expect to find paying mineral in that particular crevice or vein or seam in which he finds his rock in place bearing metal, before he can make a valid location. This is plainly a study of Judge Hawley's opinion, by the law generally, and by the light of common knowledge. If a prospector in a mining region discover a seam with a well-defined wall, bearing indications of mineral sufficient to justify him in spending his time and money in following it, in expectation of finding a main body of ore of commercial value within the ground located, a valid location of a mining claim may be made, and the expectation need not be confined to finding paying mineral in the particular seam upon which the discovery is made."

Judge Beatty, of Idaho, in *Railway Co.* vs. *Migeon,* 68 Fed., 811, after quoting from *Book* vs. *Mining Co., supra,* said that the late decisions establish " the liberal rule that it is not necessary, to the loca- " tion of a valid claim, under section 2320, that ore " of commercial value in either quantity or quality " must first be discovered within its limits" (p. 814). And the United States Circuit Court of Appeals for the Ninth Circuit, in affirming the decision in *Railway Co.* vs. *Migeon, supra* (77 Fed., 249), at page 255 said:

"The question as to what constitutes a discovery of a vein or lode under the provisions of section 2320 of the Revised Statutes has been decided by many courts. All the authorities cited by appellants are referred to in *Book* vs. *Mining Co.*, 58 Fed., 106, 121. *The liberal rules therein announced are substantially to the effect that when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute whether the rock or earth is rich or poor, whether it assays high or low,* with this qualification: that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. *It was never intended that in such a case the courts should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode.*"

The opinion of Mr. Justice Field in *Erhardt* vs. *Boaro*, 113 U. S., 527, contains a terse and very admirable summary of the statutory requirements of "discovery." At page 536, he said:

"This allowance of time for the development of the character of the lode or vein does not, as intimated by counsel, give encouragement to mere speculative locations, that is, to locations made without any discovery or knowledge of the existence of metal in the ground claimed, with the view to obtain the benefit of a possible discovery of metal by others within that time. A mere post-

ing of a notice on a ridge of rocks cropping out of the earth, or on other ground, that the poster has located thereon a mining claim, without any discovery or knowledge on his part of the existence of metal there, or in its immediate vicinity, would be justly treated as a mere speculative proceeding, and would not in itself initiate any right.

"There must be something beyond a mere guess on the part of the miner to authorize him to make a location, which will exclude others from the ground, such as the discovery of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence."
(Italics are ours.)

We think by applying the test laid down by the authorities to the case at bar, that Barieau made a discovery of oil on the land in question that in every way satisfied the statute. Although, at the risk of wearying the Court by what may seem needless repetition, attention is again called to Barieau's uncontradicted testimony. (Record, page 68):

"There is a permanent spring there, especially in the summer when it is hot. The oil runs there in the summer. I know the location because I surveyed it. . . . There is a spring there and the oil comes out and floats on the water in the summer time when it is hot. In June, 1895, there was a little water with oil and a little oil with the water coming out. It was dripping over a rock about two feet high. There was no pool, it was dripping, just dripping a little water and oil, not much water."

We respectfully submit that when Barieau had seen these oil seepages he made a discovery of oil within the meaning of the statute.

Speaking of what constitutes a discovery of oil under the Revised Statutes, Mr. Donahue, in his work on Petroleum and Gas, at page 233, says:

> "So where an oil claim is located on public lands, the locator must have actually ascertained that oil existed on the lands; and the fact that the surface indications were such, that oil might exist, is not sufficient; but the locator must know that oil existed; and a mere conclusion that oil does exist, which is drawn from other facts, is not a sufficient discovery, since the mere fact that lode or veins exist in adjacent lands is not a sufficient discovery. So, with the location of an oil claim, the fact that oil is found in nearby territory is not sufficient."

[1902] Donahue, Petroleum and Oil, p. 233.

We desire to call the Court's attention to the recent case of *Nevada Sierra Oil Company* vs. *Home Oil Company*, 98 Fed., 673, because we believe that it supports our contention that seepages of oil, when discovered upon government land, constitute a discovery of oil.

In that case, on demurrer to the bill, stated at length in 97 Fed. Rep., 681, 683, Judge Ross overruled the demurrer to the bill, which had been filed for want of equity, and sustained the bill as alleging a sufficient discovery, which, in the language of the

bill (97 Fed., 683), consisted of "the finding of seep-
" ages of oil and of the residuum of oil upon the
" claim and upon the land *adjoining* the said describ-
" ed tract."

Upon motion for injunction and receiver, in the same case (98 Fed., 675, 676) Judge Ross said:

> "The bill alleges that at the time of the posting of the notice of location of January 1, 1896, Wilson discovered seepages of oil on the land in question, as well as oil sand and shale, *but there is no showing in the proof that he discovered any seepages of oil on it.* On the contrary, I think the evidence shows beyond any doubt that there never were any seepages of oil on that quarter section of land.
>
> "It is entirely true that the statute, requiring as a condition to a valid location, the discovery of mineral within the limits of the claim, should, as between conflicting claimants to mineral lands, receive a broad and liberal construction, and so as to protect *bona fide* locators, who have really made a discovery of mineral, whether it be under the statute providing for the location of vein or lode claims or placer claims. As was well said by Judge Hawley, in *Book* vs. *Mining Co.* (C. C.), 58 Fed., 106, 120, in speaking of vein and lode claims:
>
> " 'When the locator finds rock in place containtaining mineral, he has made a discovery within the meaning of the statute, whether the rock or earth is poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes

the discovery, and warrants the prospector in making a location of a mining claim.'

"So, in respect to placer claims, if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery, within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay. The question whether a particular piece of the public land is more valuable for mineral than for agricultural purposes is one that does not arise in cases like the present. While, as has been said, the statute requiring a discovery of mineral as one of the essential conditions of a valid location of land under the mining laws should be liberally construed in behalf of *bona fide* locators, no court would be justified in ignoring the statutory requirement. Mere indications of mineral, I repeat, do not constitute the discovery of the mineral itself."
(The italics are ours.)

The decisions of Judge Ross, in the Home Oil case, upon demurrer to the bill, as well as upon the motion for injunction and receiver, show that his views are in harmony with both previous and subsequent decisions of the Federal Courts, and sustain the principle that in cases where both parties claim the land under mineral locations, that slight evidence only of a discovery of mineral, is required, which, in the case of petroleum, is sufficient where seepages

of oil or residuum of petroleum have been actually found upon the land located.

There is, of course, as Judge Ross says, a difference between "indications" of mineral and discovery of mineral itself.

In his work on Mines (2nd ed.), Vol. 1, p. 779, Mr. Lindley writes as follows respecting petroleum:

> "In the case of petroleum deposits the courts in California have in recent years been confronted with some serious problems upon the subject of what constitutes a sufficient discovery, which will sanction a location of a claim to oil lands under the laws applicable to placers. It is well known that the natural habitat of this class of mineral hydrocarbons is in stratified rocks some distance below the surface, *and except for the occasional appearance at the surface in the form of oil seepages, springs, or other indications of the subterranean existence of petroleum, there is nothing to guide the miner in making his location. It requires more or less extensive development in the nature of well-boring and prospecting to determine the nature, extent and permanency of the deposit.*
>
> "With reference to these surface indications, Judge Ross, Circuit Judge for the Southern District of California, expressed the view that:
>
> " 'Mere indications, however strong, are not, in my opinion, sufficient to answer the requirements of the statute, which requires, as one of the essential conditions to the making of a valid location of unappropriated public land of the United

States under the mining laws, of mineral within the limits of the claim. . . . Indications of the existence of a thing is not the thing itself.'

"This was said, however, not of indications existing within the boundaries of the claim in controversy but in adjoining lands.

" 'So, in respect to placer claims,' Judge Ross says, 'if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay.'

"This is in consonance with the rules announced by the courts in the case of lodes, that neither the size nor richness of the vein is material, so long as there is a genuine discovery."

And at page 606 (Vol. 1), the same writer says:

"No Court has ever held that in order to entitle one to locate a mining claim ore of commercial value, in either quantity or quality, must first be discovered. Such a theory would make most mining locations impossible. 'Logically carried out,' says Judge Hawley, 'it would prohibit a miner from making any valid location until he had fully demonstrated that the vein, or lode, of other rock in place bearing gold or silver, which he had discovered, would pay all the expenses of removing, extracting, crushing and reducing the ore, and leave a profit to the owner. If this view should be sustained, it would lead to absurd, injurious and unjust results.' "

The language of Mr. Lindley and Judge Hawley, above quoted, namely, "that any other test or rule "would make most mining locations impossible," is peculiarly applicable to the land in controversy, for the evidence in this case shows (and, indeed, it is common knowledge) that to discover oil in paying quantites thereon, it is necessary to bore hundreds of feet.

In discussing the Barieau location, the Supreme Court of the State of California say:

> "It will be thus noted that none of the appellants claim under the Barieau location, nor contend that they have acquired any of the rights of those locators. It is agreed that if the Barieau location was in all other respects a valid location, it lapsed at the end of the year 1896 by failure to perform the statutory amount of labor. If, however, the Barieau location was an invalid location, as the Court finds, then the lands were open to notorious, peaceable, and *bona fide* entry by others for the purpose of initiating a new location. The findings of the Court, as has been said, were against the validity of the Barieau location. We are satisfied that it was invalid for at least one reason. Barieau and his co-locators did not at the time of their attempted location, nor ever, make any discovery of mineral upon the land. In considering this proposition, it should be said that the mineral upon these lands is oil. Under the Act of Congress of 1897, the location of oil claims is governed by the mineral laws of the United States applicable to the location of placer mining claims. The two requirements admittedly essential to the

validity of a location such as this, are that the location must be distinctly marked upon the ground so that the boundaries can be readily traced, and that there must be a discovery of minerals within the limits of the land located. (Rev. Stat. U. S., sec. 2324.) Upon the question of discovery the sole evidence is that of Barieau himself. Giving fullest weight to that testimony it amounts to no more than this, that Barrieau had walked over the land at the time he posted his notice and had discovered 'indications' of petroleum. Specifically, he says that he saw a spring and 'the oil comes out and floats over the water in the summer time when it is hot. In June, 1895, there was a little water with oil and a little oil with the water coming out. It was dripping over a rock about two feet high. There was no pool; it was just dripping a little water and oil, not much water.' This is all of the 'discovery' which it is even pretended was made under the Barieau location, and we think it clear that such testimony does not establish a discovery within the meaning of the law. To constitute a discovery, the law requires something more than conjecture, hope, or even indications. The geological formation of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this there may be other surface indications such as seepage of oil. All these things combined may be sufficient to justify the expectation and hope that, upon driving a well to sufficient depth, oil may be discovered, but one and all they do not in and of themselves amount to a discovery. This view finds support in the *Nevada Sierra Oil Co.* vs. *Home Oil Co.*, 98 Fed. Rep., 673, where the Cir-

cuit Court was dealing with this precise question, in regard to this precise piece of land, under these identical circumstances. While perhaps it would be stating it too broadly to say that no case can be imagined where a surface discovery may be made of oil sufficient to fill the requirements of the statute, yet it is certainly true that no such case has ever been presented to our attention, and that in the nature of things such a case will seldom, if ever, occur. Nor does the view which we entertain of the essentials of a valid discovery as applied to oil bearing lands present any points of hardship, but to the contrary we think it to be not alone the only rational one which may be taken under the law, but also the only interpretation which offers security and protection to the *bona fide* locator."

Record, pages 122, 123.

We submit that the conclusion respecting the Barieau location, arrived at by the Supreme Court of the State of California, is a result of a misconception of the law and violative of the spirit and reason of the statutes governing the location of mining claims.

We respectfully submit that Congress did not intend that a prospector of oil, in order to make a valid location upon public land, has to bore and strike oil before making a valid location. According to the decision of the State Court, no matter if a stream of oil an inch thick was flowing from the land, it would not be sufficient upon which to base a discovery.

We contend that if a miner cannot make a valid location except by boring for oil that the public oil lands of this county are practically only open to location by rich and powerful corporations and individuals, and we cannot believe that such was the intention of Congress. It seems proper, in view of the importance of this question, to place before the Court a few facts bearing upon the early discoveries of oil and its remarkable history in this country.

Petroleum has been known from the earliest historic periods. Early notices of it are found in the Second Book of the Maccabees, Chap. I, "that when "the Jews were led into Persia, they found pits in "which the priests concealed the sacred fire they re-"quired for their sacrifices." After many years, their grandchildren—contemporaries of the Prophet Nehemiah—searched for the concealed fire and found an oil, which when poured upon the hot sacrificial stone, burst into a huge flame.

In Job, XXIX, 6, it is said: *"And the rock poured me out rivers of oil."*

Höfer states that Herodotus (about 450 B. C.) mentions that "eight days' journey from Babylon "stands a city called Is, the present Hit, on a small "river of the same name, which discharges its stream "into the Euphrates. Now the river brings down "with its waters many lumps of bitumen, which is

" collected and used in Babylon for building pur-
" poses."

H. Höfer, Das Erdöl, 1888.

George Henry Loskiel, in his "History of the " United Brethren Among the Indians in North " America," 1788, translated by Christian Ignatius La Trobe, London, 1794, speaks of petroleum as follows:

> "One of the most favorite medicines used by the Indians is the *fossil oil* (petroleum) *exuding from the earth commonly with water.* It is said that an Indian in the small-pox lay down in a morass to cool himself, and soon recovered. This led to a discovery of an oil spring in a morass, and since that time many others have been found in the country of the Delaware and Iroquois. They are observed both in running and standing water. In the latter, the oil swims on the surface and is easily skimmed off. But in rivers, it is carried away by the stream."

In the United States, the commencement of the industry dates from the period between 1850 and 1859. From 1859, the national wealth of the United States was thereby increased more than fifteen hundred million dollars. (Brannt, "Petroleum," p. 8.)

In 1861, a man named Frink drilled the first large flowing well. It yielded 100,000 gallons a day, and shortly afterwards another one nearby of equal capa-

city was struck. Oil wells were soon discovered in West Virginia, Kentucky and Ohio.

In 1885, the entire yield of the United States amounted to 22,000,000 barrels of forty-two gallons each, valued at $20,000,000.

In 1893, the entire United States production was 48, 412,666 barrels; and it is common knowledge that this vast industry is now controlled by a few individuals composing the Standard Oil Company.

Oil has been found in paying quantities in Pennsylvania, West Virginia, Illinois, Indiana, Ohio, Kentucky, Texas, Arizona, New Mexico, Colorado and California.

Petroleum Industry, O'Neil, p. 5.

Professor Benjamin Silliman, the elder, contributed to the "American Journal of Science," in the year 1833, what is believed to be the first reliable scientific record of the discovery of petroleum in this country. He writes as follows:

> "A fountain of petroleum, called the oil spring. This is situated in the western part of the County of Alleghany, in the State of New York. . . . The oil spring or fountain rises in the midst of a marshy ground. It is a muddy, dirty pool of about eighteen feet in diameter and is nearly circular in form.
>
> "There is no outlet above ground, no stream flowing from it, and it is, of course, a stagnant water, with no other circulation than that which

springs from the changes of temperature and from the gas and petroleum *that are constantly rising on the surface of the pool.*

"They collect the petroleum by skimming it like cream from a milk-pan. For this purpose, they use a broad, flat board, made thin at one edge like a knife; it is moved flat upon, and just under the surface of, the water, and is soon covered by a coating of petroleum, which is so adhesive, that it does not fall off, but is removed by scraping the instrument upon the lip of a cup. . . . It is used by the people of the vicinity for sprains and rheumatism, and for sores upon their horses. *It is said to rise more abundantly in hot weather than in cold.*"

Mr. O'Neil, writing upon the development of the petroleum industry in California, says:

"In California it (petroleum) has long been known, having been used by the Indians and Mission Padres. . . . The immense deposits of asphaltum in the Southern part of the State, and gas wells *and oil seepages in other localities were almost certain indications that* large amounts of petroleum were buried beneath the surface."

Naturally, to bore or drill for oil necessitates a large expenditure of money. Before this can be done the prospector must locate a place that justifies him in spending money for such purposes, and in the oil regions of the West he depends upon what he sees before spending time and money experimenting. And it does not require a trained expert to appreciate

that when he sees oil coming up from the ground that he has made a discovery of that mineral.

Whether a prospector will select this place or that place may depend very largely upon the physical features of the country.

Mr. William Wright, in his book on "The Oil Regions of Pennsylvania," published in 1865, speaking of the physical features of oil regions, says:

> "The wells put down five or six years since, in several cases, got petroleum in the first sand-rock, their owners having been led to select such spots from 'surface indications'; *that is, petroleum oozing out of the ground.*"

In Thompson and Redwood's Handbook on Petroleum, published in London, 1901, it is said (p. 3):

> "Petroleum is found in many parts of the world oozing or flowing from outcrops of porous rock, *and from this mode of occurrence it derived its name,* which means, literally rock-oil—Latin, *petra* (rock), *oleum* (oil)."

In the Century Dictionary (Vol. 15), edited by Prof. Whitney of Yale University, petroleum is defined as "an oily substance of great economical im-
" importance, especially as a source of light, *occur-*
" *ring naturally oozing from crevices in rocks or*
" *floating on the surface of water,* and also obtained
" in very large quantity in various parts of the world
" by boring into the rock."

Referring to the State Court decision upon Barieau's discovery, it is said:

> "To constitute a discovery, the law requires something more than conjecture, expectation, hope, or even indications. The geological formation of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this, there may be other surface indications, such as seepage of oil. All these things combined may be sufficient to justify the expectation and hope that, upon driving a well to sufficient depth, oil may be discovered, but, one in all, they do not, in and of themselves, amount to a discovery. This view finds support in the *Nevada Sierra Oil Co.* v. *Home Oil Co.*, 98 Fed. Rep, 673, where *the Circuit Court was dealing with this precise question, in regard to this precise piece of land, under these identical circumstances.*"

(Italics are ours.)

In the part of the opinion just referred to it will be seen that the Supreme Court of the State of California relies upon *Nevada Oil Co.* vs. *Home Oil Co.*, 98 Fed., 673, as supporting the statement that "sufficient "indications, such as seepage of oil," are not sufficient in themselves to constitute discovery, and the Court also observes that, in regard to this precise piece of land, under these identical circumstances, the Circuit Court so ruled. We submit that in this the State Court fell into a grievous and curious error. We have called attention to the Federal case (*Nevada Oil*

Co. vs. *Home Oil Co.*, 98 Fed., 673), and it is difficult to understand how the human mind could possibly distort that decision so as to conform to the language in the State Court opinion.

An examination of the decision of Judge Ross shows that he based his decision chiefly upon the fact that *no seepage had been shown upon the land,* and, in fact, in the trial of that case, the testimony was to the effect that, while there was no oil of any quantity actually discovered upon the land, that the formation of the adjoining land, seepages *upon adjoining property,* and other geological characteristics, indicated that oil would be found on the property in question. This was a mere conjecture, hope and expectation, not founded upon discovery of oil upon the land, and we fail to see how any of the language of Judge Ross can be authority in support of the State Court opinion. *Judge Ross expressly stated there was no showing in the proof that any one had discovered any seepages of oil upon the land in question,* while the State Court erroneously assumed that there were seepages upon it.

In the case at bar, the testimony is uncontradicted that oil was seen by Barieau seeping from the ground in controversy, and that oil was actually mingled with the earth. And we shall show, further on in this brief, that oil was actually taken from the ground by the Chrismans. That being so, there was something more than indications of oil *under the surface* of the

ground in question, which might or might not prove to be true.

Judge Ross says, "Indications of existence of a "thing is not the thing itself"; and he further says that *if the locator actually finds, upon public land, petroleum in or upon the ground, and so situate as to constitute a part of it, it is a sufficient discovery, within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay.*

The locator who sees oil in place does not discover indications, but the thing itself. The amount discovered may be an indication of what may be expected to be realized by development, but cannot be said to be merely an indication.

We respectfully submit that it is not for any Court to say as to the manner of extraction or the practicability of the plant used. When the oil is shown mingled with the earth, we submit that, under the decisions, a discovery has been made—not indications, but the real thing itself.

Judge Hawley, in *Book* vs. *Mining Co., supra,* says, the discovery of rock in place, containing mineral, is a discovery, no matter whether the rock or earth is rich or poor, or whether it assays high or low, and that the finding of mineral in place, distinguished from float, warrants the discoverer in making a loca-

tion. Why not so with oil? A seepage from the rock or shale is, of course, in place. In order to be a seepage, it must be forced from the larger body of oil, must be a continuous stream, *en train,* and should stand upon the same footing as to discovery as a ledge. The State Court says: "There may be other sur- " rounding indications, such as a seepage of oil." Does the Court mean surrounding indications, upon adjoining land, or upon the land in question? Why should a discovery of oil upon, say, Section 20, be said to be only indications of oil upon that section? What is it but oil?

Columbus discovered America when he saw it. Would it be correct to say he discovered indications of land when he saw it?

It is a well known fact that oil is never discovered in paying quantities upon the surface, and that it requires much labor and expense to drill deep enough to secure it in such quantities.

According to the decision of the State Court, no matter if a stream of oil an inch thick was flowing from the land, it would not be sufficient upon which to base a discovery. No one could acquire any right whatever to justify him in spending money and endeavoring to get a well. Everybody would have an equal right to drill, and the right to the title to the land would be left to the strongest and most aggressive. The bullet

and knife would take the place of a location notice. Surely, the Government did not intend such to be the case when it said that oil land might be located as placer. How much mineral must be discovered in a placer claim? The authorities are uniform that any quantity of mineral, no matter how small, is sufficient as between mineral claimants. Then why not any quantity of oil?

Possibly, as suggested by the decision of the State Court:

> "The borer is the wooer of the earth; her secrets and riches are his."

But such wooing is an expensive luxury!

> "The cost of an American boring plant is not far from $3,220. By this is meant merely the initial charges."
>
> *Technology of Petroleum,* Neuburger and Noalhat (translated by J. G. McIntosh), 1901, p. 243.

It appears from the evidence of Mr. Canfield (Record, page 60) *that the Home Oil Company paid $8,000 to sink one well!*

Therefore, we conclude that when Barieau saw oil oozing from the ground in controversy, in 1895, he made a discovery, within the meaning of the statute.

(2) *Marking the Claim on the Ground.*

Section 2334 of the United States Revised Statutes

provides that the location must be distinctly marked on the ground, so that the boundaries thereof can be readily and easily traced. The testimony shows that this was done at the time of the posting of the notice by Barieau on the land in controversy, namely, June 14, 1895.

Record, page 65.

Even if there could be any question as to the sufficiency of the markings made by Barieau, at the time of making the location, June 14, 1895, all defects were remedied by his going upon the land in the first week in January, 1896, when he resurveyed and remarked the lines of the claim.

Record, page 65.

We, therefore, submit that the location made June 14, 1895, was properly marked upon the ground as contemplated by the Statute of the United States last above cited.

Vide McKinley Mining Co. vs. *Alaska Mining Co.,* 183 U. S., 563, 570.

Haws vs. *Victoria Copper Mining Co.,* 160 U. S., 303, 318.

Book vs. *Justice Mining Co.,* 58 Fed. Rep., 106, 109, 112.

(3) and (4). *Posting and Recording Notice of Location.*

We consider both these points together for the reason that one argument applies to both.

We call the Court's attention to the fact that there is no proof of any state or local regulation or local custom existing at the time of the location of the land, made June 14, 1895, requiring the doing of either of these things. As a matter of strict law there was no statutory requirement that the notice should be posted or recorded.

> *Book* vs. *Justice M. Co.*, 58 Fed. Rep., 120.
> *Haws* vs. *Victoria Copper Min. Co.*, 160 U. S., 303, 318.

But both of these things were done and shows the absolute good faith of the locators of said claim.

> *Record*, page 65.

Therefore, the location made June 14, 1895, having been preceded by a sufficient discovery, and having been properly marked on the ground, the notice of location having been properly posted and recorded, was a valid location in every respect, was in existence and in full force and effect during the entire year 1896, *and it is of no consequence* that no annual labor was performed during that year by any of the locators of said claim, for a valid location having

once been made the locators thereof have the whole of the calendar year in which to do or perform the annual labor. The Supreme Court of the United States, interpreting the statute with reference to annual labor, has said:

> "The law fixes no time within a year when the work must be done. Consequently, if done at any time during the year, it is enough, and there can be no forfeiture until the time has gone by."

Belk vs. *Meagher,* 104 U. S., 279, 283.

Even though no work is done in the calendar year following the date of the location of a mining claim, the locators, or their grantors, have the absolute right to the possession of the property as against all the world until the last hour of the last day of the year, "for the time within which the assessment work is "to be done, begins on January 1st and ends on De- "cember 31st." "Lands are not open to re-location "until the rights of the former locators have come "to an end."

Belk vs. *Meagher,* 104 U. S., 279, 284.
Rose vs. *Richmond Min. Co.,* 17 Nev., 57.
Book vs. *Justice Min. Co.,* 58 Fed., 128.
Souter vs. *Maguire,* 78 Cal., 545.

Hence we say that the location made by Barieau and others on June 14, 1895, operated to segregate the land from the public domain so far as subsequent

mining locations were concerned, and without any other act being done, prevented the making of the location of the land in question by any one prior to the 1st day of January, 1897.

II.

The alleged abandonment by E. O. Miller in December, 1896, was invalid, inoperative and of no effect because it was made with an intent and for the purpose of re-locating the property by himself and others with him, and was not a true abandonment.

We insist that there was no abandonment by Miller in any sense of the word, even if we grant, for the sake of argument, that he was the successor in interest of *all* of the locators who made location on June 14, 1895, for the reason that there was an entire absence of intent to vacate and leave the premises open to the first comer, but on the contrary the express intention of Miller was to secure the land for himself.

It is to be borne in mind that the Barieau location did not become forfeited for failure to do assessment work until after midnight, December 31st. It was not open to re-location therefore until January 1st, 1897. But Miller claiming to have succeeded to the rights of the original locators, attempted to abandon the location in the following manner. We quote from his testimony at page 45 of the Record:

"I abandoned to the United States whatever there might be. I wanted to make it clear so there would be no question. I wanted to go as far as I could, if they (referring to his grantors) did happen to have any possible right. I wanted to clean it up. I didn't think they had, but my purpose was, if any existed, to revest the title in the government of the United States, so that I could make—so the land would unquestionably be open to location December 31, 1896,—myself and my co-locators could make a valid mineral location. I wanted to play both ends of the proposition to be safe."

(For the instrument called an "abandonment" see page 44 of the Record.)

"This abandonment was prepared at Visalia on December 29, 1896. I sent it to Fresno to Judge Harris to have it recorded; I mailed it to him I think on the night of the 29th, just before I started to Coalinga, where I got the next day. The execution of this abandonment, and the sending of the abandonment to Judge Harris, was preparatory to my making the location of December 31st, *and it was a part of the same transaction.* The notice of re-location was prepared in my office at the same time as the abandonment."

Record, page 50.

We quote again on this subject from the testimony of the witness W. F. Hall, one of Miller's associate locators (Record, page 57):

"I think it is a fact that on the 29th day of De-

cember, 1896, the day before we went to Oil City, that Mr. Miller agreed that he would make an abandonment of any interest that he might have in this land that came to him through this Producers and Consumers' deed. I think I saw the instrument in writing releasing and abandoning all interest that he had in this land to the United States, and I am sure I knew of it.

"The Court—Q. Did you understand at that time that Mr. Miller had released his interest in that to the government, so that you and he could file your mineral claims on that quarter section?

"Mr. Harris—We admit that.

"Mr. Coldwell—of course."

Record, page 58.

Briefly, then, the facts are these: The location claimed to be owned by Miller is about to lapse by reason of failure to perform the assessment work. Instead of proceeding to perform such work, Miller endeavors to fabricate a pretended abandonment—a written relinquishment of his claim to the land—which is mailed from Visalia to Fresno at the same time that he starts for the land in controversy, and posts the notice of re-location which had been prepared contemporaneously with this alleged notice of abandonment. (The abandonment was recorded Dec. 31, 1896.)

Record, page 44.

Therefore the precise question that is presented to this Court is:

Can the locator of a placer claim, who has allowed his location to lapse by a failure to perform the necessary work, abandon his claim with the intention of immediately making a re-location covering the same ground?

When is a mining claim abandoned? Manifestly there is no abandonment when there is no intention of giving up and renouncing a thing.

In the case of *Black* vs. *Elkhorn Mining Co.*, 163 U. S., 445, the Supreme Court say at page 450:

> "His (a locator's) interest in the claim may also be forfeited by his abandonment, *with an intention to renounce his right of possession.* It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had."

Bouvier says: "An abandonment is the relinquish-
" ment of a right, the giving up of something to
" which we are entitled. Abandonment must be
" made by the owner, without being pressed by any
" duty, necessity, *or utility to himself, but simply be-*
" *cause he desires no longer to possess the thing.*"
This definition was approved in the following cases:

Stevens vs. *Mansfield,* 11 Cal., 363.
Richardson vs. *McNulty,* 24 Cal., 339.
St. John vs. *Kidd,* 26 Cal., 264.
Bell vs. *Bedrock, T. and M. Co.,* 36 Cal., 214.
McLeran vs. *Benton,* 43 Cal., 467.
Utt vs. *Frey,* 106 Cal., 392.
Trevaskis vs. *Pearl,* 111 Cal., 599.

In *St. John* vs. *Kidd, supra,* the Court laid down the rule that in all cases of abandonment the test is, *"was the land left by the locator without any intention of returning or making any future use of it?"*

In the recent case of *McCann* vs. *McMillan,* 129 Cal., 350; 62 Pac., 31, it appeared that McCann and McMillan tried to re-locate a mining claim by abandoning the same for the purpose of avoiding the assessment work. The Supreme Court of the State of California held that the abandonment was made with the intent to defraud the United States Government out of one hundred dollars' worth of work and that they could not re-locate in such a manner.

The Supreme Court of Arkansas in the case of *Buffalo Zinc & Copper Co.* vs. *Crump,* 69 S. W., 572, 576 (1902), at page 576, said:

> "An abandonment is a voluntary act, and consists of the relinquishment of possession of the claim, with an intention not to return and occupy it. It is purely a question of intention. 'If there is no *animus revertandi,* the desertion of the claim determines the property at once, without regard

to the duration of the locator's absence.' To constitute an abandonment there must be an absolute desertion of the premises." (Citing Lindley on Mines, Sec. 643.)

Briefly stated our contention is that a locator cannot abandon a claim with the intention of re-locating, and we submit that it is not necessary in determining this question to affirmatively show that such abandonment was necessarily made for the purpose of avoiding the assessment work. The question is, can it be done at all where there is the intent to re-locate at the time of abandonment?

If we are wrong then it is self-evident that Courts would be lending themselves to support schemes whereby the laws of the United States requiring *bona fide* work to the amount of $100 each year on all claims in order to hold them would be entirely unenforceable.

If the claimant could allow the year to expire all but a day, and then re-locate by abandoning, one locator could perpetually hold a claim without ever expending a cent of money or an hour's work in its development. *Indeed one man could locate an entire district and hold it perpetually without the expenditure of a cent in work or money.*

As stated by Mr. Lindley in his Work on Mines (vol. 1, p. 729), 2nd ed.:

"To say that the original locator has the power within himself to make effectual a forfeiture aris-

ing from his own delinquency by performing a re-location, is to place in his hands the extraordinary privilege of holding mineral lands perpetually, without doing any work whatever, at least in those states where the re-locator is not required to do preliminary work."

Therefore, we insist that manifestly there was no abandonment by Miller in any sense of the word, even if we grant for the sake of the argument that he was the successor in interest of *all* of the locators who made location on June 14, 1895, for the reason (a) there was an entire absence of intent to vacate and leave the premises open to the first comer, but on the contrary the express intention of Miller was to secure the land for himself; (b) Miller was "pressed by necessity and utility to himself," for the reason that no annual labor had been done upon the claim or land in controversy during the year 1896. Therefore the location of 1895 was not affected by this attempted abandonment, nor the life thereof, nor the rights or obligations of the locators, and their grantees were not affected in any manner thereby. The location made by Barieau in 1895 was just as valid and complete after the attempted abandonment as before. The purported abandonment was not effective for any purpose whatever, and was wholly inoperative.

III.

The location made by E. O. Miller et al., on December 31, 1896, was invalid (a) because it was

made at a time when there was a valid, subsisting location on the land, and at a time when the property was not open to exploration and location, and in consequence no rights whatever were initiated by that location; (b) because it was not based on a discovery, and was not perfected by a subsequent discovery made before the rights of others attached to the property; (c) because the location, in fact, was made by Miller, Hall and Hannah, who were the only bona fide locators out of the eight persons named in their location, the other five being mere dummies.

These points will be discussed in the order stated.

A. The location referred to was invalid because it was made at a time when there was a valid, subsisting location on the land, and at a time when the land was not open to exploration, and in consequence no rights whatever were initiated by that location.

We have shown that A. Barieau and other persons made a valid location upon the land in controversy on June 14, 1895. This location did not come to an end until the morning of January 1, 1897. Consequently we invoke the rule enunciated by this Court in the case of *Belk* vs. *Meagher*, 104 U. S., 279, where Mr. Chief Justice Waite, speaking for the Court at page 284, said:

> "Mining claims are not open to re-location until the rights of a former locator have come to an end. A re-locator seeks to avail himself of

> mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim and left the property open for another to take up. . . . Hence a re-location on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

The same rule was stated by the Supreme Court of the State of California in the case of *Souter* vs. *McGuire,* 78 Cal., 545. A location upon land upon which there already exists a valid location is invalid, no matter how perfect in form the proceedings upon which the second location may be based.

Vide Gwillim vs. *Donnellan,* 115 U. S., 45, 49.
Del Monte Min. Co. vs. *Last Chance Min. Co.,* 171 U. S., 55, 78.

We have shown that the Barieau location, made on June 14, 1895, did not terminate until "the last hour of the last day of the year" of the time within which the assessment work should be done, and that the time for doing the assessment work did not expire until December 31, 1896. The location attempted to be made by Miller and his associates on the land in question was made on the morning of the 31st day of December, 1896.

Record, page 40.

Clearly, therefore, the location made by Miller and others was premature, inoperative for any purpose, and void, and under it the defendants in error cannot successfully assert or claim any right to the land, for no rights were initiated and none were ever acquired by the location. Clearly the land was not open to exploration and location at any time of December 31, 1896. The purported abandonment of Miller, we have shown, was entirely inoperative and nugatory and did not change the status of the land in any respect. Hence we conclude that plaintiffs in error have a right to take advantage of the fact that a prior location existed at the time that Miller and others made their location to show that the land was not open to location at that time.

B. Location was invalid because it was not based on a discovery, and was not perfected by a subsequent discovery made before the rights of the plaintiffs in error attached to the property.

Neither Miller nor any of the other persons named in the location notice posted on the ground by Miller on December 31, 1896, made a discovery of any mineral upon the land in question. Miller, himself, said that he did not make any discovery prior to said date, and the only discovery that he ever made on the land was made through the operations of the Home Oil

Company, some time subsequent to September 17, 1897.

Record, pages 46, 42.

Plaintiffs in error made their locations Jan. 1, 1897 (pages 61, 62, of this brief).

Therefore, we respectfully submit that—whether or not the land was open to exploration and appropriation on the 31st of December, 1896,—Miller and his co-locators did not make a valid location upon the ground on said date, because of non-compliance with the provisions of the mining laws and failure to perform the acts necessary to the initiation of a valid location; and whatever preliminary acts may have been performed by them were, in the absence of a discovery on or before said date, insufficient to bar a complete and valid location made by plaintiffs in error upon the following day, based upon *discovery* and full requirements of the mining laws.

The mere marking of a location upon the ground and posting a notice thereon initiates no rights to the ground and bars no rights which another person, if a *bona fide* locator, may wish to assert. Miller's alleged location of December 31st, 1896, did not segregate the land from the public domain and did not prevent plaintiffs in error from going upon the ground on January 1st, 1897, and making a valid location thereon.

Discovery is the source of title to mineral lands and the primary source of the miner's title thereto.

U. S. Revised Statutes, Sections 2318, 2319, 2320.

Lindley on Mines and Mining, Vol. 1, Sec. 335 (2nd ed.)

As was said by Halleck in his introduction to De Fooz on the Law of Mines, p. xxvi, "*Discovery* is "made the source of title and *development* or work-"ing, the condition of the continuance of that act."

A location can rest only upon an actual discovery, and such discovery must precede the location or be in advance of intervening rights.

Hawswirth vs. *Butcher,* 4 Mont., 299.
Upton vs. *Larkin,* 7 Mont., 449.
North Noonday M. Co. vs. *Orient M. Co.,* 6 Saw., 299.
Ledoux vs. *Forester,* 94 Fed., 600.
Perigo vs. *Erwin,* 85 Fed., 904.
Erwin vs. *Perego,* 93 Fed., 608.
Nevada Sierra Oil Co. vs. *Home Oil Co.,* 98 Fed., 673.
Olive Land & D. Co. vs. *Olmstead,* 103 Fed., 568.

Mr. Justice Field, speaking for the Court in the

case of *Erhardt* vs. *Boaro,* 113 U. S., 527, at page 536, said:

> "The mere posting of a notice on a piece of land by one who has no knowledge on his part of the existence of mineral therein, and without a previous discovery, would be justly treated as a mere speculative proceeding and would not initiate any right. There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground."

In view of the foregoing authorities, we maintain that the location of December 31, 1896, was invalid; that it was not cured by the discovery of the locator's lessee; and that the discovery and other acts of location made and performed by the plaintiffs in error on January 1st, 1897, entitle the latter to the land in controversy. The facts constituting the Chrismans' discoveries will be shown in discussing those points (pages 61, 62 of brief).

C. The location made by Miller et al. on December 31, 1896, was not valid, because the location in fact was made by Miller, Hall and Hannah, who were the only bona fide locators out of the eight persons named in their location, the other five being mere dummies.

On December 31, 1896, E. O. Miller posted a notice of location on the land in question, thereby at-

tempting to locate a full quarter section of 160 acres. In order to successfully make such a location under the mining laws of the United States, it was necessary that there should have been an association of not less than eight persons. (Revised Statutes of the United States, Section 2330.) The mining laws of the United States originally contemplated that each individual citizen should have the right to locate 20 acres of placer mining land. In order, however, that placer mining might be developed to its full extent, this right of individual location was extended so that eight persons, instead of making individual locations of 20 acres, might form an "association" and together locate 160 acres. In order that such a location may be legal, each of the requirements of the statute must be complied with, and the demands of the statute fulfilled. There must be eight persons, each qualified to make a valid location of 20 acres. The eight, before making the consolidated location, must form "an association." *All must be interested in the location, and the location must have been made by all, whether they all acted upon the ground or authorized some one of the number to act for all.* Otherwise they are not *bona fide* locators within the meaning of the statute—Congress has used the term "association." It is submitted that, in using such a term, Congress intended to signify a body of persons who had confederated together for a particular purpose,

or united together without a charter for the prosecution of some common enterprise. Does the evidence in this case disclose any such confederation or union of persons?

An examination of the testimony shows that Miller, Hannah and Hall entered into a contract, agreement, union or confederacy, as they may choose to term it, to locate this northeast corner of Section 20. It was necessary that they should have at least eight names on their location, and to that end, without making any explanations or disclosing who were to act with them, and without any prior contract or agreement whatever, they severally went to the five other persons named in the location and obtained from them permission to *use* their names. Even in this regard there was no union of action. Mr. Hall, acting by himself, secured the names of certain of the five, and Mr. Miller, acting by himself, without concert with his partners, secured the balance, neither consulting with the other and none of the five really understanding what was intended, and agreeing to nothing whatever, either with Mr. Hall, Mr. Hannah or Mr. Miller, or with their so-called associates, except merely granting the privilege of using their names in making the location.

E. O. Miller testified as follows:

"Prior to making this location I talked with Mr. Hannah and Mr. F. Hall, and *possibly* with

Mr. Overall. There was no arrangement between us three in regard to making these locations except that we would go over there and locate this ground for mining purposes. I don't know that there was any specific arrangement about going ahead to develop or to bore for oil, but it was understood that we were to take it for the purpose of mining, for the purpose of developing. There were no details entered into at that time. I never talked with Charles H. Smith, L. E. Hall or R. B. Biddle about the matter, nor had any arrangement with them; but, as I told you, *I might possibly have talked with Mr. Overall.*"

Record, page 46.

There was no contract between the eight parties, no confederacy, no union, no anything constituting the eight a partnership, or *quasi* partnership, or "association," within the meaning of the United States Statute. It has been uniformly held by federal courts that such attempted location is of no avail, and a fraud upon the government. In *Lindley on Mines* (Vol. 1, Sec. 450), 2nd ed., it is said:

"It is a matter of frequent occurrence that an individual locator, desiring to obtain more ground than he is permitted under the law to appropriate in his individual capacity by a single location, resorts to the use of "dummies" and perfects locations in their names, subsequently obtaining conveyances thereof. The courts have held that this is a fraud upon the government."

In *Durant* vs. *Corbin,* 94 Fed., 382, District Judge Hanford, at page 383, said:

> "The policy of the government in disposing of the mineral lands as well as other portions of the public domain is to make a general distribution among as large a number as possible of those who wish to acquire such land for their own use rather than to favor a few individuals who might wish to acquire princely fortunes by securing large tracts of such lands, and it is contrary to this policy and to the provisions of sections twenty-three hundred and thirty and twenty-three hundred and thirty-one of the Revised Statutes for one person to cover more than twenty acres of placer ground by one location by the device of using the names of his employees and friends as locators."

Vide Gird vs. *Californa Oil Co.,* 60 Fed., 531, 545.

Mitchell vs. *Cline,* 84 Cal., 409.

Before any discovery of oil had been made upon the Miller location, seven of the co-locators conveyed to Miller their interests.

Those whose names are used for the purpose of filling out the location are rightly termed "dummies" by the courts and the authorities. All the parties named in the location attempted to be made December 31, 1896, other than Miller, Hannah and Hall, were "dummies," as the term is used and understood, and the location for that reason was a fraud upon the United States Government, and void and of no effect.

IV.

By reason of the fact that no assessment work whatever was done on the land in question in the year 1896, the location made by Barieau and others lapsed, and the land on the 1st day of January, 1897, became open for exploration and location.

A. Barieau and others having, as we have shown, on the 14th day of June, 1895, made a valid location upon the land in question, it then became incumbent upon them, or their grantees, to do certain other acts, or else forfeit whatever rights they had acquired by such location. It was necessary for them to do a certain amount of work upon their claim during the year following its location, namely, the year 1896.

U. S. Revised Statutes, Sec. 2324.
Belk vs. *Meagher,* 104 U. S., 279.
Hammer vs. *Garfield M. Co.,* 130 U. S., 291.

According to Barieau, no work whatever was done on the land in 1896.

Record, page 66.

It follows from the foregoing, that the location made by Barieau and others, while reserving the land from appropriation by others up to January 1, 1897, on that date lapsed because the assessment work required by the statute to have been done in the year 1896 was not done, and, in consequence, whatever

claims Miller or others may have had to the land involved herein, and covered by said location, became valueless on the first day of January, 1897. There can be no question of "resumption" of work by the claimants under the Barieau location made in 1895, because the evidence conclusively shows that no work was done at any time either before or afterwards by these persons, or their grantees, and that whatever work was done there was done by the Home Oil Company during the year 1897, as tenants of E. O. Miller, under his claimed location made December 31, 1896. Therefore, the land in controversy, by reason of the lapsing of the location made in 1895, became open for exploration and location on January 1, 1897.

V.

The locations made by the plaintiffs in error, January 1, 1897, were valid locations. They performed every act required by law to make a valid location in the State of California.

Prior occupation and working of mineral lands of the United States, without conforming to the requirements of any law, either federal, district or local custom, does not give the right of possession as against one who afterwards peaceably locates a mining claim covering the same ground, and in all respects complies with the federal and district mining laws and customs.

From the time the second person has perfected his location, the prior occupant is a trespasser.

Belk vs. *Meagher,* 104 U. S., 279.
Horswell vs. *Ruiz,* 67 Cal., 111.
Morenhaut vs. *Wilson,* 52 Cal., 263.
McCormick vs. *Varnes,* 2 Utah, 355.
Noyes vs. *Black,* 4 Mont., 534.

Manifestly, then, if the evidence shows that the plaintiffs in error complied with the laws in making their locations on the portions of land claimed by them, they had a right to locate, and the possession or occupancy of Miller, actual or constructive, on January 1, 1897, was of no avail as against plaintiffs in error.

The evidence shows that A. Y. Chrisman and H. T. Chrisman did everything that was necessary to initiate a valid location on the first day of January, 1897.

A. Y. Chrisman made a discovery of petroleum within the boundaries of his claim prior to posting the notice.

Record, page 82.

This testimony is corroborated by H. T. Chrisman.

Record, page 75.

In December, 1896, he took some of the liquid to Lavelle to be tested.

Record, page 79.

A. Y. Chrisman marked the location upon the ground by means of sufficient monuments, and posted a notice of location thereon.

Record, pages 80, 81.

He has been in possession ever since. Affidavits of work have been filed of record.

Record, pages 82, 86.

H. T. Chrisman made discovery upon his own claim near the southeast corner of the northeast quarter.

Record, page 75.

He posted a notice of location and built monuments to mark the boundaries.

Record, pages 72, 73, 74.

He remained in exclusive possession up to the time this action was instituted.

Record, page 75.

Plaintiffs in error not only performed the neces-

sary annual labor prescribed by law, but also prosecuted extensive improvements.

Record, pages 85, 86, 87.

The foregoing testimony is undisputed. The law governing the question of discovery has already been discussed in this brief (pages 13 to 38 inclusive).

VI.

The conveyance to Miller by his associates upon July 31, 1897, being given prior to any discovery, vested no title in him or his lessees.

The admitted facts, for the purpose of considering this question, are, that E. O. Miller and W. F. Hall, on the 31st day of December, 1896, went upon the northeast quarter of section 20, township 19 south, range 15 east, M. D. M., and posted a notice of location for themselves and six others named in the notice, and marked the boundaries; that on July 31st, 1897, all of E. O. Miller's co-locators executed a deed to him, in and by which they conveyed, or transferred to him, all their right, title and interest in and to said property under said location.

Record, page 47.

On the 17th day of September, 1897, E. O. Miller executed a lease of said premises to Frank Barrett,

and at about the said time transferred said lease to the Home Oil Company.

Record, page 42.

The Home Oil Company went upon said premises and commenced boring for oil, and at some time subsequent to September 17th, 1897, struck oil and made the first discovery of oil according to the claims of the defendants in error.

Therefore, the precise question that is presented to this Court is: *Can there be any transfer or assignment of a mining location not perfected by discovery? In other words, can there be an assignment of the right to locate?*

Section 2320 of the Revised Statutes of the United States in effect provides that all locations must be based on discoveries, and the whole tenor of the statutes of the United States providing for the acquiring of title to mineral lands is to the effect that no rights whatsoever are acquired by or vested in a locator until an actual discovery has been made. And courts have so held. Some of the judges, in considering this particular point, have stated it to this effect, namely, that until discovery, the locator had nothing which the law recognized, excepting a mere license to explore, had no vested rights, no property, nothing which could pass by a conveyance, but that when a discovery was made, it related back to the

taking of the first step in making the location; provided *there were no intervening rights.*

Our contention, therefore, is that before discovery associate locators have no rights which they can convey to others. And as the seven associate locators of Miller had conveyed all their interests in the 160 acres to him before a discovery was made, no right or title vested in him upon the subsequent discovery of oil by his lessee, the Home Oil Company, other than a right to locate as an individual twenty acres of land.

In his dissenting opinion in this case (Record, page 127), Chief Justice Beatty, of the Supreme Court of the State of California, said:

> *"I dissent from the order denying a rehearing of this cause. There can be no location of a mining claim before discovery, and there can be no transfer or assignment of a location before the location is complete. There can, in other words, be no assignment of the right to locate.* If, in the expectation of discovery, an association of persons marks the boundary of a placer claim containing twenty acres for each associate, I have no doubt that they will be protected in their possession while they proceed with reasonable diligence to prospect the claim, and that by a discovery they will perfect it; *but if some of the associates withdraw before discovery or attempt to assign their claims to those who continue the work of development, those who remain will have no right to a claim greater in the aggregate than they could have taken by an original location."*

On the other hand, Mr. Justice Henshaw, speaking for the State Court, in disposing of our contention, says:

"It sufficiently appears from what has heretofore been said that a location such as this, made by eight associates, is but a single location, each associate having an individual eighth interest in the whole. It further appears that certain valuable rights become the property of such locators even before discovery. They have the right of possession against all intruders (*Garthe* vs. *Hart*, 73 Cal., 541), and they may defend this possession in the Court (*Richardson* vs. *McNulty*, 24 Cal., 339). They have, then, this right of possession and with it the right to protect their possession against all intrusion, and to work the land for the valuable minerals it is thought to contain.

"We cannnot perceive why these rights may not in good faith be made the subject of conveyance by the associates as well before as after discovery. There is certainly nothing in the express law upon the subject to lead to the view that this cannot be done, and there is much to give countenance to the contrary conviction. Thus the law expressly provides that if one of the co-locators abandons his claim or interest by refusing to bear his portion of the cost of the assessment work, such abandonment does not, as would be claimed, work the destruction of the whole location, 'but his interest in the claim shall become the property of his co-owners who have made the required expenditures.' (Rev. Stats., U. S., Sec. 2324.)

"It is to be borne in mind that a location such as this, though it contained 160 acres, is still a

single location, a single claim, with undivided interests covering the whole of it.

"Any work done upon the claim is done for the benefit of all the co-locators. It is undisputed that when the location has once been perfected one of the associates may by conveyance acquire all of the rights of his fellows, and we can perceive no reason why the right to prosecute the work and perfect such a location by discovery may not itself be vested in a single one of them. If, instead of conveying, the seven associates stood idle and refused to contribute their share to the necessary work of developing, and Miller under these circumstances had alone prosecuted the work to a successful discovery, no one could contend, in the face of Section 2324 of the Revised Statutes of the United States, but that Miller would have acquired the rights of all, and would have had a perfected location covering the whole 160 acres.

"If, then, by their abandonment, without a conveyance, Miller would have acquired the right to prosecute the work and perfect the whole location for himself individually, it is impossible to see why a conveyance to him of their right, instead of an abandonment of it by a refusal to join in the work, should effectuate any different result."

With the conclusion arrived at by the State Court from the above reasoning we beg to differ, and to suggest that it is contrary to established rules of law, to public policy and violative of the spirit and reason of the statutes governing the location of mining claims.

This is the first time, so far as we are able to ascertain after an exhaustive research, that this question has been squarely presented to any Court, and the decision blazes a new trail through the forest of mining law and establishes a precedent on which will be based in the future the title to many valuable mines. It is, therefore, of the most vital importance that such an important rule of property should be established only after the most exhaustive research and argument, so that it may be so firmly imbedded in law and reason as to forever withstand the assaults of sophistry and specious argument.

We submit that the conclusion arrived at by the State Court is the result of a misconception of the law and of reasoning by false analogism. For instance, it is said in the opinion: "It further appears " that certain valuable rights become the property of " such locators even before discovery. They have " the right of possession against all intruders and they " may defend this possession in the Court." (*Garthe* vs. *Hart*, 73 Cal., 541.)

In *Horswell* vs. *Ruiz*, 67 Cal., 111, the Court held that prior occupation and working of the mineral lands of the United States, without complying with the requirements of any law, either Federal, district or local custom, does not give a right of possession as against one who afterward peaceably locates a mining claim covering the same ground, and in all

respects complies with the Federal and district mining laws and regulations. From the time the second person has perfected his location the prior occupant is a trespasser.

The Court in *Adams* vs. *Crawford,* 116 Cal., 495, went even further, and held that the *discovery* of a mining claim vested no right or title to the property and was but one step in acquiring title. In that case, two persons made a joint discovery, but before completing the location by marking the boundaries thereof and recording the location notice other persons first completed a valid location of the same, and it was held that the title of the subsequent locators should prevail against the first discoverers of the claim.

The Supreme Court of the United States held in *Deffeback* vs. *Hawke,* 115 U. S., 392, that there was no color of title in a mere naked possession.

In *Beals* vs. *Cone,* 27 Colo., 473, it was held that until a discovery is made no rights are acquired by location.

> "Mere possession does not supply the place of a location or protect the possessor against a location peaceably made; and if the possessor permits in silence an intrusion upon his possession, and a location is peaceably made thereon, he cannot complain."
>
> 20 Am. & Eng. Ency. of Law (2d Ed.), p. 724.

"A prospector on the public mineral domain may protect himself in the possession of his *pedis possessionis* while he is searching for mineral. His possession is held good as a possessory title against all the world except the Government of the United tSates. But if he stands by and allows others to enter upon his claim and first discover mineral in rock in place, the law gives such first discoverer a title to the mineral so first discovered, against which the mere possession of the surface cannot prevail."

Crossman vs. *Pendery*, 8 Fed. Rep., 694, per Justice Miller.

"Every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry upon it while it is in the possession of those who have no superior right to acquire the title or to hold the possession. *Any other rule would make the wrongful occupation of the public land by a trespasser superior in right to a lawful entry of it under the Acts of Congress by a competent locator*" (p. 279).

Thallman vs. *Thomas*, 111 Fed. Rep., 277.

In that case the complainants were in the possession of a ledge under the ground in dispute and actually and actively engaged in extracting ore therefrom when the defendant, who was in the employ of the complaintant as shift boss, learning that the workings had extended beyond the boundaries of its claim,

went upon the surface of the adjoining land and made a location.

"Possession without a location carries no title. Possessory titles do not live upon possession alone. They must be supported by proof of a compliance with the law that gives the right to and sustains the possession. The mere naked possession of a mining claim upon the public land is not sufficient to hold such claim as against a subsequent location made in pursuance of the law and kept alive by a compliance therewith."

Patterson vs. *Tarbell,* 26 Oregon, 34, quoting Chief Justice Wade.

"The right of possession comes only from a valid location."

Lindley on Mines (2d Ed.), Sec. 218, p. 376.

"The mere evidence of staking boundaries is not proof of possession."

Boardman vs. *Thompson,* 3 Mont., 387.

In *Olive Co.* vs. *Olmstead,* 103 Fed. Rep., at page 572, the Court, in speaking of placer claims, said:

"One of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws is a discovery of mineral within the limits of the claim." (Citing many Federal Court and Department decisions.)

. . . . . .

"It is clear that the location (placer) in con-

troversy . . . amounted to nothing for the reason that no discovery . . . had been made. . . . It is not pretended that the defendants . . . remained in the actual possession of any part of the premises, and if they had, the law is well settled that the mere occupancy of the public land and improvements thereon gave no vested right therein . . . The defendant . . . had made no such location as prevented the lands from *being in law, vacant.*

"Others had the right to enter upon the lands for the purpose of taking them up under the mining laws, if it could be done peaceably and without force, or to acquire the government title thereto by any other legal means. (Citing *Sparks* vs. *Pierce,* 115 U. S., 408, 413; . . . *Garthe* vs. *Hart,* 73 Cal., 541, and others.)"

"It cannot be said that a mere naked possession, without any attempt to comply with any of the laws of the United States, will reserve the land possessed from location, *even for an instant.*"

Snyder on Mines, Sec. 236, p. 204.

The rights possessed by locators on pre-emption claims to public land and those on mining claims should not be confounded. There is a distinction between them which was long ago recognized by this Court. In *Du Pratt* vs. *James,* 65 Cal., at page 556, it was said: "It has been held by the Supreme Court "of the United States, and by this Court, that a per- "son cannot enter upon the actual possession of an- "other for the purpose of laying a foundation for a

"pre-emption claim to public land of the United "States; and it is claimed by the appellant that the "*same principle* operated upon the parties to this "controversy, and the defendant could not lawfully "enter upon the possession of the plaintiff and make "a valid location, nor acquire any right as against "the plaintiff; that the defendants could not, by a "trespass, lay a foundation for obtaining the bene- "fit of the Act of Congress for the location of min- "ing claims . . . but we think a close exam- "ination of the Act of Congress (Rev. Stats., 2322 "and 2324) shows the reverse to be the better view."

As recently as 1901 the Court, in *Tuolumne Cons. Mg. Co.* vs. *Maier,* 134 Cal., 583, 585, 586, held as follows:

> "We take it to be the conceded law that there can be no valid location of a mining claim without an actual mineral discovery thereon, and for the purposes of this case it is unnecessary to decide whether such discovery must precede the posting and filing of the notices; for it may be here conceded that a previous location may be made valid by a subsequent discovery of mineral: *still there can be no valid claim to the land, and it must be treated as government land up to the time of such discovery.*"
>
> . . . . . .
>
> "Treating the land, then, as government land the time of the construction across it of appellant's ditch, whatever right may have been acquired in it by subsequent discoveries of mineral was subject to the easement of plaintiff's ditch, and to his

rights as a prior appropriator. (*Smith* vs. *Hawkins,* 110 Cal., 125; *Broder* vs. *Water Co.,* 101 U. S., 275.)"

There are innumerable other authorities to the same effect as the foregoing, but we deem it unnecessary to cite further.

Inasmuch as the foregoing authorities establish that a person in the mere naked possession of a mining claim has no color of title thereto, we feel that the Court erred in holding that the associates of Miller could convey to him before discovery such an interest as would vest in him title to 160 acres after a discovery had been made. We believe that prior to discovery they had no interest in the land which was susceptible of transfer. They each held merely an inchoate right to an undivided one-eighth interest in a tract of 160 acres of land which would be perfected upon a discovery being made thereon during the continuance of the association. This right was dependant upon the possession and working of the claim in good faith, and only secured to them the protection of the law against trespassers. If they permitted other parties to enter upon the land and such parties made a discovery of mineral and within the time allowed by law otherwise perfected their location, all rights of Miller and his associates, if there were eight persons associated in the subsequent location, would cease and they would become trespassers as against

the latter. If, however, there was but one subsequent locator, he would be entitled to but twenty acres of land immediately surrounding his discovery, and the right to prospect the remaining 140 acres would still remain in Miller and his associates. In other words, the territory to which their right attached would diminish in the proportion of twenty acres to each person associated in the subsequent location. Such would be the result in a placer location, and in that respect it differs from a lode location. In the latter, no matter how many claimants might be associated, the maximum amount of land that could be located is an area 1500x600 feet, and if the subsequent locators numbered one or a dozen the result would be the same, viz.: the entire claim of the first locators would cease and title thereto vest in the subsequent locators. This difference in results is due to the distinction made by the statutes between placer and lode locations. In the former class of claims each individual is limited to a twenty acre tract as a maximum claim, and an association of more than one and not more than eight persons can locate a claim not exceeding in the aggregate a number of acres equivalent to twenty acres for each locator.

Revised Statutes, U. S. Secs. 2329-2330.
Union Oil Co., (on review), 25 L. D., 358.
McDonald vs. *Montana Wood Co.*, 35 Pac. Rep., 668.

Lindley on Mines (2d Ed.), Sec. 438.
Kirk vs. *Meldrum,* 28 Colo., 453.

Keping in mind this fact, and the further fact that a valid location of a mining claim, either lode or placer, is originated only by a discovery, it would seem that the size of the claim of subsequent locators of a placer claim who make a discovery is fixed by the number of persons associated in such location at the time of discovery, and the quantity of land lost by the original claimants who have made no discovery, is measured by the same standard. The quantity of land which the original association could take upon a discovery should, therefore, be limited as against the government and the public in general to twenty acres for each person in the association *at the time of their discovery.*

The mere marking of the boundaries of a claim upon the ground and the posting of a notice of location confer upon the person so doing no valid claim to the land marked and do not result in the acquisition of title thereto from the government. Such acts merely constitute notice that the person has exercised the license given him by the government to search for mineral in the tract of land specified in the notice. This license is both conditional and exclusive. It is conditional upon the active and continuous prosecution of his search for mineral and made exclusive by the protection afforded him by the Courts while

he is so engaged against harrassment or trespass by others. Should he fail to prosecute his search the ground is open to the next comer. This person, by posting a new notice of location and continuing the search, acquires the license formerly possessed by the other. A transfer of this license or privilege cannot be made, because it is purely personal and continues only while actually exercised. An attempted transfer thereof would convey no additional right or any other thing of value to the purchaser, because the latter always possessed the right, independent of any act of the seller, to enter upon, locate and work the claim the instant it was abandoned. The seller had nothing to convey, because the Government had parted with no title or estate in the premises to him. The United States retains title to the land until a discovery of mineral has been made made thereon. All that the seller would convey to the purchaser by the attempted transfer would be the information that he had abandoned his license and that it might be exercised by the purchaser. A deed of conveyance would not constitute a muniment of title, but would merely be valuable as evidence that the seller had abandoned his license. So in the case at bar, the grantees of Miller had no estate or interest on the land, but merely a license to continue in possession thereof while searching for mineral thereon. The fact that an association of eight had acquired the privilege to

search for mineral upon a tract of land eight times greater in area than that to which an individual could obtain the privilege only had the effect of changing the exclusive privilege of each to prospect upon twenty acres of land into the privilege of prospecting jointly with seven others a tract containing 160 acres. No estate was thereby conveyed to any of them by the Government, nor was the non-assignable character of the license changed.

There is in the statute no words granting the tract of land before discovery of mineral thereon, nor any words by which any estate or interest in it is raised by implication. The Courts, however, have by construction, given the prospector a mere naked license to enter upon the unappropriated public land of the United States, and protect him while exercising such license from trespassers.

> "A license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party, and cannot be transferred or alienated by the licensee because it is a personal matter, and is limited to the original parties to it. A sale of the lands by the

owners instantly works its revocation, and in no sense is it property descendible to heirs."

De Haro vs. *United States,* 5 Wall., 599, 627.

"One may extend a license to the general public, as for instance, by opening a public place of business or throwing open his land so that all who will may enter."

18 Am. & Eng. Ency. of Law (2d Ed.), p. 1139, and authorities cited at p. 1134.

This the Government of the United States, under the construction given the statute by the Courts has done to all who wish to prospect for precious metals on its unappropriated public lands. No estate or interest in said land is conveyed, however, to any person other than a mere naked license, which is revocable at the will of the Government and terminates on the transfer of the land.

When a discovery of mineral has been made an estate is vested in the discoverer upon his compliance with the provisions of the statute relative to marking of boundaries, recording, etc., which termniates all prior licenses granted therein, which is good as against all persons and constitutes an estate of inheritance to all intents and purposes.

A valid location in compliance with the requirements of law has the effect of a grant from the government of the right to the exclusive possession of the

lands located and constitutes an estate of inheritance to all intents and purposes.

Gaylord vs. *Place*, 98 Cal., 472.
Forbes vs. *Gracy*, 94 U. S., 762.
Seymour vs. *Fisher*, 16 Colo., 188.
Atkins vs. *Hendree*, 1 Idaho, 95.
Hopkins vs. *Noyes*, 4 Mont., 556.

We believe that our view of the law is sustained by the United States Circuit Court in *Nevada Sierra Oil Co.* vs. *Home Oil Company*, 98 Fed. Rep., p. 676. There Judge Ross, in speaking of a transfer made by one Barrett to one Miller, of an oil location upon which no discovery had been made, and the subsequent abandonment of the same by Miller, said: "He later undertook to transfer the same thing "(which was nothing) to defendant Miller, who "later undertook to relinquish to the United States "*what he did not have, namely, a right to the land* "*in question.*"

Why? Because there was no discovery. Holding, in fact, that no estate is acquired until discovery, and conflicting directly with the opinion of the State Court in this case.

Section 2319 of the Revised Statutes of the United States says:

"All valuable mineral deposits in lands belonging to the United States are hereby declared to be

free and open to exploration and purchase, and the lands in which they are found to occupation and purchase . . . under regulations prescribed by law."

Section 2320 says:

"Mining claims upon veins . . . whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; *but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.*" (The italics are ours.)

Sections 2330 and 2331 provide that an association of not less than eight persons can locate not more than 160 acres as a placer claim and limit the area of such claim for each individual locator to twenty acres.

In construing these Sections the Courts have laid down the rule that if a person monuments, stakes or otherwise marks the exterior boundaries of his claim before discovery, a subsequent discovery of mineral within those boundaries operates as an appropriation of the land marked if other rights have not intervened, and it is further held that no mining right has intervened unless the claimant thereof has made a discovery of mineral on the land. As soon as the subsequent location is perfected the first locator becomes a trespasser. (*Crossman* vs. *Pendery,* 8 Fed. Rep., 693, and other authorities cited, *supra.*) In other

words, the mere *license* of the first prospector was revoked when the discovery of mineral by the second person operated as a conveyance to him by the Government of an *estate* in the land located. As heretofore stated, if the subsequent discovery was peaceably made by one person on a tract of 160 acres being prospected by eight associates, he would be limited to an estate not exceeding 20 acres immediately surrounding his discovery; if made by any number of persons not exceeding eight, an estate would be acquired in and to a tract not exceeding twenty acres for each person associated at the time of the discovery. In other words, the quantity of land to which title could be acquired as against the original licensees would be determined by the number of *bona fide* discoverers. So, too, if the discovery was first made by the original licensees after marking the boundaries of 160 acres, and while others were engaged with their consent in prospecting the ground, we contend that the number of acres they could hold as against the others would be determined by the number of *bona fide* associates at the time the discovery was made.

The license given to a prospector upon unappropriated Government land ceases whenever the Government by any method conveys the land to another. It also ceases upon the death of the licensee. It is not an interest or estate in the land that will descend

to his heirs. If an association of eight persons locates 160 acres of land, and before a discovery is made thereon one of the number dies, the heirs of the deceased can claim no estate in the location. Neither could the remaining seven locators, upon a discovery of mineral, acquire title to the whole 160 acres, for the law of survivorship does not obtain as to licensees. The statute limits the number of acres to twenty for each person, and consequently a remarking of 140 acres would have to be made. If by death or otherwise the association was reduced to a single individual before discovery, the survivor could acquire title to but twenty acres. If they all died before a discovery was made the land became vacant, and no right, interest or license in and to the same vested in any one other than the Government. The heirs of the last survivor acquired no interest in or to any portion thereof.

After a discovery has been made upon unappropriated Government land, and the law in other respects has been complied with, the situation is different. An estate has vested in the locator, which can be disposed of in any manner known to the law. If he should die his heirs succeed to the same, and upon taking the necessary steps can obtain patent thereto from the United States. And this is the case whether the location was made as an individual or jointly with others.

When the discovery has been jointly made upon placer ground an estate vests in each of the locators of an undivided interest in the claim, the extent of which is determined by the number of persons associated in the discovery. Such individual interest is property capable of being transferred and transmissible to one's heirs. Whatever may be the number of acres less than 160 that are located, there is but *one claim,* in which each person has an undivided interest. To protect the entire claim the law requires that labor to the amount of $100 shall be done thereon each year. Failure to perform this amount of work upon the claim destroys the estate of each and every locator thereon. To protect the vested estate of each and every one of the joint locators in said claim prior to issuance of patent, and to prevent the interest of any one being destroyed by the failure of the other to do his proportion of the required annual work, the statute (Sec. 2324), as stated in the opinion of the State Court "provides that if one of the co-locators " abandons his claim or interest by refusing to bear " his portion of the cost of the assessment work, such " abandonment does not, as would be claimed, work " the destruction of the whole location, but his inter- " est in the claim shall become the property of his co- " owners who have made the required expenditures."

(In the statute the word "co-locators," in the first line of the quotation, reads "co-owners.")

In the opinion in this case the last mentioned section of the Revised Statutes of the United States is cited as giving countenance to the conclusion that before discovery a locator has a right which is the subject of conveyance. We feel that the Court overlooked the distinction between the license of a prospector prior to a discovery and the estate which vests in him upon making a discovery, which has been referred to above. This distinction is observed in the statute, for therein, in the same section it is said "the *claim or mine* upon which such fail-"ure occurred shall be open to re-location in "the same manner as if no location of the same "had ever been made, provided that the original "locators, their *heirs, assigns or legal representatives,* "have not resumed work upon the *claim* after failure 'and before such location." (Italics are ours.)

We further submit that the section of the statute quoted refers to claims upon which a discovery has been made, for the reason that it provides that "upon "the failure of any one of several *co-owners* to con-"tribute his proportion of the expenditures . . . "the *co-owners* who have performed the labor, etc." Before a discovery a prospector is not an *owner.* The Government is the *owner.* The prospector is a mere licensee.

We also suggest that the provisions of Section 2324, Revised Statutes of the United States, relative to the

performance of annual assessment work upon claims do not refer to locations upon which a discovery has not been made. A prospector's right to possession is not dependent upon the performance of assessment work. It depends upon *pedis possessio.* If a person made a discovery upon a location to-day he would have until January 1st, 1906, within which to perform one hundred dollars' worth of labor, and no matter where he might be, the Courts would, in the absence of an express abandonment by him, protect his title to such claim. Should one absent himself for that period from a location upon which no discovery had been made, it would operate as an abandonment of any right he might have had. (*Ferris* vs. *Coover,* 10 Cal., 589, 632; *Belk* vs. *Meagher,* 104 U. S., 279, 283.) The location would not be such as would prevent the lands from being in law vacant. (*Olive Co.* vs. *Olmstead,* 103 Fed. Rep., p. 572.)

We submit that if the decision under discussion is to become the law, it would contravene the express policy of the United States and nullify the statutes limiting a placer claim to twenty acres for a single individual. No longer would a locator content himself with a twenty-acre claim when the law would sanction the use by him of the names of seven accommodating friends who would permit the use of their names to enable him to locate 160 acres of land, and immediately transfer to him all their interests in and

to the same. It is the policy of the Government to discourage all attempts on the part of an individual to appropriate by the use of "dummies" more ground than he is permitted under the law to locate as an individual, and in the light of such policy, the Court should favor a construction of the statutes which would tend to promote it as against one which would foster and encourage its evasion.

Before concluding, we would state that the statement in the opinion, "that Miller, his associates and "lessees remained in possession of the land, and "with diligence and with great expense prosecuted "the work of boring wells," is not sustained by the evidence. It is shown without contradiction that on the 31st day of December, 1896, Miller, and his associates only posted a location notice and attempted to mark the boundaries of the claim. They immediately, and without making a discovery of oil, left the premises and made no attempt at any time to do anything further on the land. In July, 1897, the seven associates of Miller transferred their interests to him and he executed on Septembr 17th, 1897, a lease of the said premises for a term of ten years to one Frank Barrett, who on the same day assigned the same to the Home Oil Company. The latter entered upon the premises and in October, 1897, made a discovery of oil. The only work done upon the claim was that of the Home Oil Company. Miller

and his associates did no work upon the land prior to the lease made to the Home Oil Company, nine and one-half months after the location. They attempted to appropriate and hold the land for purely speculative purposes, and it seems were successful in the attempt. Their actions in respect to the land does not contrast favorably with those of the defendants Chrisman, who each made a discovery of oil upon the tract, located the same on January 1st, 1897, did not use any of his friends' names to increase the size of his claim, but contented himself with locating twenty acres immediately surrounding his discovery, built a cabin upon the claim, lived there and remained in actual occupancy, engaged in working the ground, until after the discovery of oil by the lessees of Miller in October, 1897.

Mr. Chief Justice Fuller, speaking for the Court in *St. Louis Min. Co.* vs. *Montana Min. Co.*, 171 U. S., 650, at page 655, said:

> "Where there is a *valid* location of a mining claim, the area becomes segregated from the public domain and the property of the locator. There is no inhibition in the Mineral Lands Act against alienation, and he may sell it, mortgage it or part with the whole or any portion of it as he may see fit."

This Court is now asked to extend the foregoing rule to the case where the location is not perfected by discovery.

We respectfully submit that until a location is *perfected by discovery,* it cannot be transferred or assigned and we base our contention upon the decisions of this Court.

In *Belk* vs. *Meagher,* 104 U. S., 279, it is said at page 283:

> "A mining claim *perfected under the law* is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent."

The language of the Court in the case of *Noyes* vs. *Mantle,* 127 U. S., 348, is so applicable to this case that we cannot do better than to quote therefrom. At page 351, Mr. Justice Field said:

> "Section 2322 of the Revised Statutes declares that the locators of mining locations previously made or which should thereafter be made, on any mineral claim, vein, lode or ledge on the public domain, there heirs or assigns, where no adverse claim existed on the 10th of May, 1872, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations so long as they comply with the laws of the United States and with State, territorial and local regulations not in conflict with those laws governing their possessory title. *There is no pretense in this case that the original locators did not comply with all the requirements of the law in making the location of the pay streak lode mining claim,* or that the claim was ever abandoned or forfeited. *They were the discoverers of the claim.* They marked its boundaries by stakes,

so that they could readily be traced. They posted the required notice, which was duly recorded in compliance with the regulations of the district. *They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment to the ground.* The claim *was thenceforth their property.*"

Plaintiffs in error respectfully insist that the judgment of the Supreme Court of the State of California ought to be reversed, with directions to such Court to order the Superior Court of the County of Fresno to render judgment in favor of plaintiffs in error herein, the defendants in such State Courts.

Respectfuly submitted,

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